Natural Art Materials Industries Sdn Bhd & Anor v Oriental Top Ltd

HIGH COURT (SHAH ALAM) — CIVIL APPEAL NO 12–47 OF 1996
LOW HOP BING J
17 JANUARY 1997

Civil Procedure *— Appeal — Appeal from subordinate court to High Court — Whether appellant must, in an appeal under O 49 r 6 of the Subordinate Courts Rules 1980, file a memorandum of appeal — Rules of the High Court 1980 O 55 r 2 — Subordinate Courts Rules 1980 O 49 r 6*

This was an appeal from the defendant ('the appellant') against a decision by the Sessions Court in Klang to allow part of the plaintiff's ('the respondent') application for summary judgment. The respondent raised a preliminary objection on the ground that the appeal was incompetent since the appellant has failed to file and serve the memorandum of appeal as required by O 55 r 2 of the Rules of the High Court 1980. The respondent submitted that the appellant must, in an appeal under O 49 r 6 of the Subordinate Courts Rules 1980 ('the SCR'), file the memorandum of appeal. The appellant said that O 49 r 6, as amended, has done away with the requirement of filing a memorandum of appeal and this has been expressly stated in clear and unambiguous terms.

Held, dismissing the preliminary objection:

The amendment to O 49 was included as a special provision to regulate the conduct of an appeal to a High Court judge in chambers from any decision of a subordinate court other than a decision made after trial. The amendment has also simplified the compilation of documents for the purposes of filing an appeal record in that in an appeal from a decision made by a subordinate court other than a decision made after trial, the requirement to include any memorandum of appeal is dispensed with (see p 317C–D); *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038, *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054 and *Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty* [1997] 3 MLJ 342 followed; *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705 distinguished. Furthermore, the words used in O 49 r 6(3) are clear and unambiguous and must be given their popular, plain and ordinary meaning, ie no memorandum of appeal is required for the purposes of an appeal under O 49 r 6 of the SCR (see p 318H).

Obiter:

The doctrine of stare decisis is a doctrine of fundamental importance and its application is universal in all common law jurisdictions. However, in its application, it is necessary to look at the actual decision of the higher court based on the facts of the case (see pp 318I and 319B).

[**Bahasa Malaysia summary**

Ini adalah rayuan daripada defendan ('perayu') terhadap keputusan Mahkamah Sesyen di Klang untuk membenarkan sebahagian daripada permohonan plaintif ('penentang') untuk penghakiman terus. Penentang mengemukakan satu bantahan permulaan atas alasan bahawa rayuan adalah tak competen kerana perayu telah gagal memfail dan menghantar serah memorandum rayuan seperti dikehendaki oleh A 55 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980. Responden berhujah bahawa perayu mesti, dalam satu rayuan di bawah A 49 k 6 Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR'), memfailkan memorandum rayuan. Perayu menyatakan bahawa A 46 k 6, seperti yang dipinda, telah menghapuskan keperluan untuk memfailkan memorandum rayuan dan ini telah dengan khususnya dinyatakan dalam terma-terma yang terang dan jelas.

Diputuskan, menolak bantahan permulaan:

Pindaan kepada A 49 dimasukkan sebagai peruntukan khas untuk mengawal kelakuan rayuan kepada hakim Mahkamah Tinggi dalam kamar daripada apa-apa keputusan daripada mahkamah rendah selain daripada keputusan yang dibuat selepas perbicaraan. Pindaan juga meringkaskan pengumpulan dokumen untuk tujuan memfailkan rekod rayuan di mana dalam satu rayuan daripada keputusan yang dibuat oleh mahkamah rendah selain daripada keputusan yang dibuat selepas perbicaraan, keperluan untuk memasukkan memoraum rayuan dihapuskan (lihat ms 317C–D); *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038, *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054 dan *Subramaniam all Kunhikuttan v Aladath Putham Veetal Moidutty* [1997] 3 MLJ 342 diikut; *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705 dibeza. Tambahan pula, perkataan-perkataan yang digunakan dalam A 49 k 6(3) adalah jelas and terang dan mesti diberikan makna mereka yang umum, mudah dan biasa, iaitu memorandum rayuan tidak diperlukan untuk tujuan rayuan di bawah A 49 k 6 KMR (lihat ms 318H).

Obiter:

Doktrin stare decisis adalah satu doktrin yang mempunyai kepentingan asas dan penggunaannya adalah sejagat dalam semua bidang kuasa common law. Akan tetapi, dalam penggunaannya, adalah mustahak untuk melihat keputusan sebenar mahkamah yang lebih tinggi berdasarkan kepada fakta-fakta kes (lihat ms 318I dan 319B).]

Notes

For cases on appeals from subordinate court to High Court, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 422, 440.

Cases referred to

Dalip Bhagwan Singh v PP [1998] 1 MLJ 1 (refd)
Hongkong Bank Malaysia Bhd v Sereedevi (t/a SD Rest House [1997] 3 MLJ 605 (refd)
Kawalan Sempurna Sdn Bhd v HI-Tech Electrical Sdn Bhd [1996] 3 CLJ 737 (refd)
Kemajuan Hunda Kredit (Kuching) Sdn Bhd v Titus Chuo Mui Ing [1995] 2 MLJ 542 (refd)
Mah Kah Yew v PP [1971] 1 MLJ 1 (refd)
Nikodo Pte Ltd v GVC Karaoke Sdn Bhd [1997] 2 MLJ 742 (refd)
Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd [1996] 2 CLJ 1038 (folld)
Perdana Finance Bhd v Azmi Ahmad & Ors [1997] 2 CLJ 325 (refd)
PP v Chu Beow Hin [1982] 1 MLJ 135 (refd)
PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276 (refd)
Radio and General Trading Co Sdn Bhd, The v LB Jaya Sdn Bhd [1998] 1 MLJ 346 (refd)
Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty [1997] 3 MLJ 342 (folld)
Syarikat Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd [1995] 1 CLJ 113 (refd)
Tan Ah Tee & Anor v Paimon bin Kasiran [1996] 3 AMR 4043 (refd)
Vong Ban Hin v Laksamana Realty Sdn Bhd [1996] 3 AMR 4054 (folld)
Yupaporn Seangarthit v Neil Allan Campbell Webb [1995] 3 MLJ 705 (distd)

Legislation referred to

Rules of the High Court 1980 O 55 r 2
Subordinate Courts Act 1955 s 4
Subordinate Courts Rules 1980 O 26A, O 49 rr 2(4), 3(2)

Appeal from: Summons No 52–788 of 1993 (Sessions Court, Shah Alam)

WC Chia (*KB Chua & Co*) for the appellant/defendant.
MK Chen (*Raja Darryl & Loh*) for the respondent/plaintiff.

Cur Adv Vult

Low Hop Bing J:

Background

On 21 March 1996, the learned sessions judge in Klang allowed part of the plaintiff's ('the respondent') application for summary judgment under O 26A of the Subordinate Courts Rules 1980 ('SCR'). The defendant ('the appellant') had appealed against that part of the sessions judge's decision.

The respondent had at the outset raised a preliminary objection on the ground that this appeal is incompetent since the appellant has failed to file and serve the memorandum of appeal as required by O 55 r 2 of the Rules of the High Court 1980.

Submission by the respondent's counsel

It was submitted for the respondent that the appellant must, in an appeal under O 49 r 6, file the memorandum of appeal, as this was held to be the requirement by the Court of Appeal in *Yupaporn Seangarthit v Neil Allan Campbell Webb* [1995] 3 MLJ 705, which had in turn referred to the High Court decision by Richard Malanjun J in *Syarikat Kayu Bersatu Sdn Bhd & Ors v UMW (Sarawak) Sdn Bhd* [1995] 1 CLJ 113. Mahadev Shankar JCA in the *Yupaporn* said (at p 708H–I):

> Although O 49 r 6(3) could have been more clearly worded, it cannot be understood to mean that it has abrogated the requirement of O 55 r 2 of the RHC.

By reason thereof, learned counsel for the respondent added that pursuant to the doctrine of stare decisis, this appeal before me should be dismissed in limine.

Learned counsel however conceded that there is another High Court decision, ie that of Abdul Kadir Musa JC (now J) in *Pembinaan Nadzri Sdn Bhd v Koon Hoe Co Sdn Bhd* [1996] 2 CLJ 1038, to the effect that in an interlocutory appeal under O 49 r 6, there is no legal requirement whatsoever for the appellant to file a memorandum of appeal. Be that as it may, learned counsel for the respondent urged the court to follow the decision of the Court of Appeal in *Yupaporn*.

Response by the appellant's counsel

The appellant's learned counsel said that O 49 r 6, as amended, has done away with the requirement of filing, inter alia, a memorandum of appeal, and this has been expressly stated in clear and unambiguous terms. The appellant has not been served with Form 141 under the SCR and therefore there is no requirement whatsoever to file a memorandum of appeal.

The decision of the Court of Appeal in *Yupaporn* was delivered at the stage of the application for leave and so at most the authority is merely persuasive which is therefore not binding.

Decision of the court

Procedure before amendment

Before the amendment to O 49, there was only one procedure for preferring an appeal against a decision of the subordinate court, irrespective of whether the decision was made after a full trial or in an interlocutory or summary application. The procedure was governed by O 49 rr 2 and 3,

wherein the court from which the appeal was brought was mandatorily required to send Form 141 together with the notes of evidence and the grounds of decision to the appellant after the notice of appeal in Form 140 was filed. Thereafter, pursuant to O 55 r 2 of the Rules of the High Court 1980, the memorandum of appeal must be filed by the appellant within 14 days from the date of receiving Form 141.

Procedure after amendment

Since the amendment to O 49 brought about by PU(A) 193/93, O 49 r 6 was included as a special provision to regulate the conduct of an appeal to a High Court judge in chambers from any decision of a subordinate court other than a decision made after trial. A distinction was therefore introduced in the procedure in relation to a decision of the court made after a trial and a decision which is not made after trial, eg made in an interlocutory or summary application. The amendment has also simplified the compilation of documents for the purposes of filing an appeal record in that in an appeal from a decision made by a subordinate court other than a decision made after trial, the Rules Committee has, in its wisdom, dispensed with the requirement to include, inter alia, any memorandum of appeal.

In view of the importance of O 49 r 6, I have decided to reproduce it in extenso, as follows:

> (1) Notwithstanding anything contained in this Order, an appeal shall lie to a Judge in Chambers from any decision made by the Court other than a decision made after trial.
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> (2) The appeal shall be brought by filing a notice of appeal in Form 140 within 14 days from the day on which the decision was pronounced, and serving a copy of the notice on every other party to the proceedings within the time limited for the filing of appeal to the Registrar of the High Court.
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> (3) Within three weeks after the filing of the notice of appeal, the appellant shall file the record of appeal in the High Court and the record shall contain copies of —
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> (a) the application for the decision;
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> (b) the statement of claim, and where defence has been filed, the statement of defence;
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> (c) all affidavits filed in support of or in opposition to the application; and
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> (d) the decision appealed from,
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> *but shall not include the notes of evidence, the grounds of judgment or any memorandum of appeal.* (Emphasis added.)

It seems absolutely clear to me that the above provisions are intended to expedite the disposal of the hearing of an appeal against a decision of a subordinate court in respect of an interlocutory or summary application, as has been explained by the Court of Appeal in *Yupaporn* to reduce the delay caused in the registration of appeals by the non-availability of the grounds of decision and notes of evidence which can take a long time in

the subordinate court. In actual practice, advocates and solicitors are only able to prepare a memorandum of appeal after the grounds of decision and notes of evidence have been prepared and supplied by the subordinate court. Where, for example, no grounds of decision and/or notes of evidence are provided, it is axiomatic that a counsel for an appellant is in no position to prepare a memorandum of appeal. Hence, the Rules Committee has again in its wisdom expressly enacted the amendment with the avowed purpose of dispensing with the inclusion of a memorandum of appeal. Further, in the instant appeal, there is nothing before me to indicate that the Sessions Court in Klang has served the appellant with a notice in Form 141, pursuant to O 49 r 2(4) or O 49 r 3(2) of the SCR. Hence, the facts of this case are distinguishable from the facts of the case in *Yupaporn* where Form 141 was served on the appellant's solicitors on 3 January 1994. Most importantly, it is necessary to observe that O 49 r 6(1) starts with the words: 'Notwithstanding anything contained in this Order ...'. In my view, these words are incorporated to produce the effect that the provisions of O 49 r 6(1) shall prevail as an exception to the other provisions contained in the whole of O 49, including O 49 r 2(4) and O 49 r 3(2) and so by necessary implication, O 49, r 6(3) is an exception to O 55 r 2(1) and (2) of the Rules of the High Court which makes a particular reference to O 49 r 2(4) and O 49 r 3(2) in so far as the memorandum of appeal is concerned. As such an exception, O 49 r 6(3) has therefore been expressly enacted by the Rules Committee to do away with the inclusion of a memorandum of appeal for the purposes of an appeal to a judge in chambers.

A B C D E

The task of interpretation

In embarking upon the task of interpreting a provision of the law or ascertaining the intention of the legislative authority (eg in the instant case, the Subordinate Court Rules Committee, in exercise of the powers confered by s 4 of the Subordinate Courts Act 1955), the court must bear in mind that its function is *jus dicere* not *jus dare*; the words of a statute must not be overruled by the judges, but reform of the law must be left in the hands of Parliament (see *Maxwell on Interpretation of Statutes* (12th Ed) pp 1–2 and applied by Raja Azlan Shah Ag LP (as HRH then was) in *PP v Chu Beow Hin* [1982] 1 MLJ 135 at p 136D).

F G

The words 'but shall not include ... any memorandum of appeal' used in O 49 r 6(3) are clear and unambiguous. No technical or scientific words are used. They must be given their popular, plain and ordinary meaning, ie no memorandum of appeal is required for the purposes of an appeal under O 49 r 6 of the SCR.

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Doctrine of stare decisis

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The application of the doctrine of stare decisis has never been doubted in Malaysia. It is a doctrine of fundamental importance and its application is universal in all common law jurisdictions. The doctrine has been authoritatively stated by Chang Min Tat FJ in the Federal Court decision of

PP v Datuk Tan Cheng Swee & Anor [1980] 2 MLJ 276 at pp 277–278, and Peh Swee Chin FCJ in *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1. See also the principles enunciated by Wee Chong Jin CJ (Singapore) in *Mah Kah Yew v PP* [1971] 1 MLJ 1 at p 2F.

However, in the application of the doctrine of stare decisis, it is essential to look at the actual decision of the higher court based on the facts of the case. Hence, where the facts are on all fours in the previous decision of the higher court and the case in the court below, then the decision of the higher court is binding on the lower court. However, where as in the case before me, the facts are fundamentally different and distinguishable, then the doctrine of stare decisis does not apply. As stated above, the facts in *Yupaporn* reveal that Form 141 was served on the appellant's solicitor, the facts in the instant case has no such feature at all.

It is to be noted that in *Vong Ban Hin v Laksamana Realty Sdn Bhd* [1996] 3 AMR 4054, Augustine Paul JC held that there is no necessity to file a memorandum of appeal in an appeal under O 49 r 6 of the SCR.

Similarly, Azhar JC in *Subramaniam a/l Kunhikuttan v Aladath Putham Veetal Moidutty* [1997] 3 MLJ 342 arrived at the same conclusion and held that the three documents, namely the notes of evidence, grounds of decision and memorandum of appeal are no longer imperative.

I am in entire agreement with the aforesaid decisions of Abdul Kadir Musa JC (now J), Augustine Paul JC and Azhar JC in the aforesaid cases. I therefore associate myself with the sentiments expressed therein and also hold that O 49 r 6 has clearly and unambiguously dispensed with the inclusion of the notes of evidence, the grounds of decision and the memorandum of appeal, for the purpose of filing an appeal pursuant thereto.

In the circumstances, I hold that the preliminary objection raised by the respondent is devoid of merit and is dismissed. There is no order as to costs.

However, it is noteworthy that the problem posed by the interpretation of O 49 r 6(3) in relation to O 49 r 2(4) and O 49 r 3(2) of the SCR, read with O 55 r 2 of the Rules of the High Court 1980 will continue in the light of the apparently contrasting approaches adopted by our superior courts, viz the decision of the Court of Appeal in *Yupaporn* and that of Richard Malanjum J in *Syarikat Kayu Bersatu*; that of Abdul Malik Ishak J in *Tan Ah Tee & Anor v Paimon bin Kasiran* [1996] 3 AMR 4043; that of Hishamudin J in *Perdana Finance Bhd v Azmi Ahmad & Ors* [1997] 2 CLJ 325; that of Arifin Zakaria J in *The Radio and General Trading Co Sdn Bhd v LB Jaya Sdn Bhd* [1998] 1 MLJ 346 in one direction, and going in the opposite direction are the following decisions, viz in *Kawalan Sempurna Sdn Bhd v HI-Tech Electrical Sdn Bhd* [1996] 3 CLJ 737, per Abdul Kadir Sulaiman J; *Nikodo Pte Ltd v GVC Karaoke Sdn Bhd* [1997] 2 MLJ 742, per Abdul Kadir Sulaiman J; *Kemajuan Hunda Kredit (Kuching) Sdn Bhd v Titus Chuo Mui Ing* [1995] 2 MLJ 542, per Abdul Kadir Sulaiman J; *Hongkong Bank Malaysia Bhd v Sereedevi (t/a SD Rest House* [1997] 3 MLJ 605, per Augustine Paul J; *Pembinaan Naadzri*, per Abdul Kadir Musa JC

(now Judge); *Vong Ban Hin*, per Augustine Paul JC; and *Subramaniam a/l Kunhikuttan*, per Azhar JC. In view of the continuing problem arising from the above sets of decisions, it is my wish that the party aggrieved by my decision herein do file an appeal against my decision so that the Court of Appeal and, if the necessity arises, the Federal Court can resolve this problem once and for all in which case the principle enunciated by the Court of Appeal or the Federal Court would become settled law.

As a similar preliminary objection was raised by learned counsel for the respondent in Shah Alam High Court Rayuan Sivil No 12–47–95, my decision herein also applies there.

Preliminary objection dismissed.

Reported by Zahid Taib